STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2003
v MARCELLE DORSEY, Defendant-Appellant.	No. 240856 Wayne Circuit Court LC No. 01-011553-02

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DELANO L. GAFFNEY, Defendant-Appellant.	No. 240857 Wayne Circuit Court LC No. 01-011553-01

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant Dorsey appeals as of right his convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Codefendant Gaffney appeals as of right his convictions of second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227b. Both defendants were sentenced to 22½ to 40 years' imprisonment for the murder convictions and a consecutive two-year term for the felony-firearm conviction. Dorsey was additionally sentenced to a concurrent one to five year term for the felon in possession conviction. We affirm.

Dorsey argues that the trial court erred in admitting witness Lanier McPherson's prior inconsistent testimony because it "contained none of the indicia of reliability required for admissibility." We disagree. Dorsey concedes that McPherson's prior inconsistent testimony was admissible pursuant to MRE 801(d)(1), under which a statement is not hearsay "if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding. . ." Dorsey

argues, however, that even when evidence is admissible under a rule of evidence, it is still necessary to determine whether admission would violate a defendant's constitutional right to confront the witnesses against him. Dorsey bases this assertion on cases that involve the use of prior statements of an unavailable witness. Here, McPherson testified at trial.

Dorsey additionally argues that the prior testimony was perjured, as established by McPherson's testimony at trial, and that a conviction based on perjured testimony is fundamentally unfair and must be set aside. However, the only basis for this allegation is McPherson's testimony at trial. The rule of evidence contemplates that the jury will determine whether the witness is telling the truth at trial, or was telling the truth in the prior testimony. Absent any objectively verifiable evidence that the prior testimony was in fact perjured, the court did not abuse its discretion in admitting testimony that clearly fell within the parameters of MRE 801(d)(1)(A), and leaving the credibility determination to the jury. *People v Morrow*, 214 Mich App 158, 165; 542 NW2d 324 (1995).

Dorsey next argues that the trial court erred in failing to sua sponte instruct the jury as to the proper use of witness Reto Andrews' prior inconsistent statements. In contrast to McPherson, who implicated Dorsey in his pretrial testimony and retreated from that testimony at trial, Andrews implicated Dorsey at trial, but gave inconsistent statements to the police when initially questioned. Dorsey argues that because the court instructed on the permissible use of McPherson's prior statements, but did not mention Andrews', the jury may have concluded that it could not consider Andrews' prior statements for any purpose.

Dorsey did not request that the jury be instructed regarding the proper use of Andrews' prior statements. Thus, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The same principles that applied to McPherson's testimony were applicable to Andrews'. Although the court initially referred to McPherson's prior statements, the substance of the instructions referred to "the witness." It is likely that the jury applied the same rules to Andrews' prior statements. Assuming the jury did not do so, it is unlikely that it would have concluded that the prior statements should be ignored altogether. Rather, it is more likely that if the jury did not apply the rules enunciated by the court, it instead considered all the prior statements without restriction, i.e., as substantive evidence. Under MRE 801(d)(1)(A), Andrews' preliminary examination testimony could properly be considered as substantive evidence. To the extent the jury may have wrongly considered his prior statements to police as substantive evidence, Dorsey could not have been prejudiced because the statements were more favorable to Dorsey than Andrews' testimony at trial. We therefore conclude that Dorsey has not established plain error affecting his substantial rights.

Dorsey next argues that there was insufficient evidence to convict him of felony-firearm and felon in possession of a firearm. When determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in the light most favorable to the prosecution, and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Additionally, "it is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The gist of Dorsey's argument is that there was no testimony that

what he possessed was actually a firearm within the statutory definition of that term, which excludes "a smooth bore rifle or handgun designed and manufactured exclusively for propelling by a spring, or by gas or air, BB's not exceeding .177 caliber."

Andrews testified that Dorsey and Gaffney both drew their guns while they were in the car on the night of the incident. According to Andrews, Dorsey pointed a gun at his back, and Gaffney pointed a gun at Cherrell King's (the victim's) neck. Andrews testified that Dorsey's gun appeared to be a chrome .45, and that Gaffney's gun was a .380 or a nine millimeter. Following a "big bang," Andrews saw that King had been shot in the back of the head. Andrews testified that while Gaffney disposed of King's body in the abandoned house, Dorsey held him at gunpoint. Based on Andrews' testimony, including his description of the guns used, the jury could reasonably infer that Dorsey possessed a firearm during King's murder. Additionally, the parties stipulated that Dorsey had been convicted of a felony in 1996, and was not eligible to carry a firearm as of the date of the incident. Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence presented from which a rational trier of fact could find the elements of felony-firearm and felon-in-possession of a firearm were proven beyond a reasonable doubt.

Dorsey's final issue was also raised by codefendant Gaffney. Defendants argue that they were denied their constitutional right to confrontation guaranteed by US Const, Am VI and Const 1963, art 1, § 20, when evidence concerning King's statement to the police, which implicated them in another murder case, was admitted at trial. We disagree. Before trial, the prosecution moved to admit evidence of King's statement to the police regarding another murder, pursuant to MRE 404(b), to show that Dorsey and Gaffney had a motive to murder King. The trial court ruled that the evidence was admissible pursuant to MRE 404(b) to prove motive. At trial, Investigator James Fisher testified that King gave a statement to police implicating Dorsey and Gaffney in a different murder case. Fisher did not discuss any specifics about King's statement. The trial court issued a cautionary instruction to the jury concerning the use of the evidence that King's statement implicated defendants in the other murder case.

Defendants argue that evidence of King's statement was inadmissible as an exception to the hearsay rule where the declarant is unavailable, because it did not bear the "satisfactory indicia of reliability" required for admissibility of former testimony of unavailable witnesses, pursuant to MRE 804(b)(1), or the requirements of MRE 803(24) or MRE 804(b)(6), or any other exception to the hearsay rule. However, King's statement was not hearsay, because it was not being "offered in evidence to prove the truth of the matter asserted." The truth of King's assertion to the police was irrelevant, i.e., it was not important whether Dorsey and Gaffney participated in the prior murder. Even if King's statement was untrue and a false accusation, the fact that he made the statement was still relevant to the material issue of motive.

Gaffney further asserts that the court erred in admitting the evidence under MRE 404(b)(1) because it was substantially more prejudicial than probative, and was used as propensity evidence. We disagree. Under MRE 404(b)(1), evidence of other acts may be admitted if (1) it is offered for a proper purpose, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice. *People v Rice (On Remand)*, 235 Mich App 429, 439-440; 597 NW2d 843 (1999). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Id.*, 440. The prosecution sought to introduce evidence that

King had given a statement to the police incriminating defendants in the other murder case to demonstrate that defendants had a motive to kill King. This Court has held that "proof of motive in a prosecution for murder, although not essential, is always relevant." *Id*. We find no abuse of discretion in the court's determination that the probative value was not outweighed by the prejudicial effect, and the court's instruction was adequate to protect defendant against the use of the evidence for an improper purpose. The trial court did not abuse its discretion in admitting the evidence under MRE 404(b)(1) as relevant to the issue of motive.

Gaffney next argues that the prosecutor improperly vouched for the credibility of McPherson during closing argument, when he stated:

> [McPherson] had nothing to gain by implicating these two men. In fact, he said at the end of his testimony I was angry with him. Well he was angry with them and then he implicated them with the truth.
>
> * * *
>
> So when [McPherson] is talking, he has a reason to talk to Gaffney. Gaffney, are you gonna come down and help me out, testify for me? Gaffney says no. He says, oh, you are not gonna testify for me. Well I'm angry. I'm gonna tell the police the truth about you.

It is well settled that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda,* 448 Mich 261, 276; 531 NW2d 659 (1995). A review of the prosecutor's remarks in context reveals that he was not vouching for McPherson's credibility, but instead was merely reviewing the evidence in the case and responding to defendant's theory of the case, which necessarily attacked McPherson's credibility when giving his former testimony. The prosecutor's comments did not vouch for McPherson's credibility, but rather, reiterated to the jury that when McPherson implicated Dorsey and Gaffney before trial, he did not have anything to gain, because at that time, they had refused to testify on his behalf in the other murder case.

The prosecutor argued from the evidence that McPherson's motivation for incriminating Dorsey and Gaffney before trial was because he was angry with them for failing to exculpate him in the other murder case. Subsequently, Gaffney implicated someone else as the shooter in the other murder case, thereby relieving McPherson of principal liability. The prosecutor argued that the jury should believe McPherson's pretrial testimony, because his testimony at trial was influenced by the fact that Gaffney would testify favorably for McPherson in his upcoming trial in the other murder case, i.e., if McPherson exculpated Gaffney in the instant case, Gaffney would return the favor and exculpate McPherson in the other case. "No prosecutorial misconduct occurred and [] any prejudice that might have occurred could have been eliminated had a curative instruction been given following a timely objection." *People v Schutte*, 240 Mich App 713, 720-721; 613 NW2d 370 (2000). The issue was unpreserved, and defendant has failed to demonstrate plain error which affected his substantial rights; therefore, the issue is forfeited. *Carines, supra,* 763.

Gaffney next argues that the trial court erred in instructing the jury on the necessarily lesser included offense of second-degree murder. Gaffney claims that his right to notice of the

charges against him was violated where he was charged with first-degree murder, and the trial court instructed the jury on the charge of first-degree murder and the necessarily lesser included offense of second-degree murder. Gaffney concedes, however, that the trial court was obliged to give this instruction under *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975), overruled by *People v Cornell,* 466 Mich 335, 358; 646 NW2d 127 (2002), which was the law at the time this case was tried. This Court has held that in order to "assure defendant's due-process rights to fair notice, the trial judge may not instruct on lesser included offenses over defendant's objection unless the language of the charging document 'be such as to give the defendant notice that he could at the same time face the lesser included offense charge.'" *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998). However, "notice is adequate if the latter charge is a lesser included offense of the original charge." *People v Usher*, 196 Mich App 228, 232; 492 NW2d 786 (1992). First, we note that Gaffney did not object to the lesser charge. Second, because Gaffney was charged with first-degree murder, of which second-degree murder is a necessarily lesser included offense, *People v Jenkins,* 395 Mich 440, 442; his claim that his right to notice was violated is without merit.

Gaffney next claims that in light of footnote 13 in our Supreme Court's recent decision in *Cornell, supra,* the trial court erred in instructing the jury on the charge of second-degree murder. Defendant's argument is without merit. Since 1975, trial courts have followed the rule set forth by our Supreme Court in *Jenkins, supra,* 442, that "because every charge of first-degree murder necessarily includes the lesser offense of second-degree murder, in every trial for first-degree murder . . . the trial court is required to instruct the jury *sua sponte*, and even over objection, on the lesser included offense of second-degree murder." As noted above, *Jenkins* was controlling at the time the trial court issued the jury instructions in the instant case.

However, to the extent that *Jenkins* conflicted with its holding in *Cornell, supra*, 358, our Supreme Court overruled *Jenkins, supra,* 440, noting:

> *Jenkins* held that in a case involving a charge of first-degree murder, the trial court is always required to instruct the jury on the necessarily lesser-included offense of second-degree murder, even where such an instruction is not requested or is objected to. In light of our holding that a requested instruction on a necessarily included offense must be supported by the evidence, an instruction on second-degree murder, as a necessarily included lesser included offense of first-degree murder, is not automatically required. Rather, such an instruction will be proper if the intent element differentiating the two offenses is disputed and the evidence would support a conviction of second-degree murder. However, given that in many cases involving first-degree murder, the intent element is disputed, we suspect that more often than not, an instruction on second-degree murder will be proper. [*Cornell, supra*, 358, n 13.]

Our Supreme Court's June 18, 2002 holding in *Cornell* was given "limited retroactive effect, applying to those cases pending on appeal in which the issue has been raised and preserved." While the instant case was pending on appeal at the time the *Cornell* decision was released, the issue Gaffney now raises was not preserved, as defendant failed to object below. Moreover, the jury was free to conclude, as it apparently did, that while convinced that defendants murdered King, the prosecution's proofs regarding first-degree murder were lacking.

Gaffney next argues that he was denied the effective assistance of counsel where defense counsel failed to object to the prosecutor's closing argument and failed to object to the trial court instructing the jury on the charge of second-degree murder. We disagree. As noted above, the prosecutor's comments and the trial court's instructions were not improper. It is well settled that trial counsel is not ineffective for failing to raise a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper